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No. 88-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 87 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The litigants in this case have assumed the validity of the Board rule, first announced in *Celanese Corporation of America*, 95 NLRB 664 (1951), excusing an employer's refusal to bargain with the union certified as the em-

ployees' exclusive representative if the employer reasonably believes that the union no longer represents a majority of the employees. In this brief we argue that this Court's recent decisions and their rationale show that the *Celanese* rule simply cannot bear reasoned scrutiny. If an employer doubts the continued majority support of an incumbent union, the employer must seek decertification of the union through a Board conducted election, and continue to bargain with the union unless and until the union is declared by the Board no longer to be the exclusive representative.

1. The *Celanese* rule was developed shortly after the Board announced, in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), that in initial recognition situations, an employer could refuse to bargain so long as the employer had a "good faith doubt" of the union's majority support, and the *Celanese* rule explicitly rests on the *Joy Silk Mills* rule. In the initial recognition situation, however, *Joy Silk Mills* has been abandoned, and employers are now entitled to insist upon a union-instigated Board conducted election before incurring any obligation to bargain. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

The considerations underlying the *Linden Lumber* holding were several. First, a Board conducted election is a method superior to other available options for determining the true sentiments of employees as to union representation. An election provides an unambiguous answer to the representation question, guards against the influence of both peer and employer pressure, and is more likely to foster an informed choice. Second, nothing in the statute mandates inquiry into an employer's "scienter" in refusing to bargain, and such an inquiry is inherently likely to lead to litigation complexity and therefore to delays. And third, it makes sense to place upon the party seeking to alter the existing form of industrial governance the burden of showing the need for that change.

2. Although the Board has not reexamined the *Celanese* rule in light of *Linden Lumber*, this Court's cases indicate that the principles for certifying a union established in *Linden Lumber* similarly mandate that, where the question is *de*certifying a union, such decertification is to occur only through the Board's formal processes, invoked by those seeking to alter the extant system of industrial governance.

The NLRA does not provide that a certification of a union as exclusive representative expires after any particular length of time, or upon the occurrence of any specified event. Instead, the statute, as construed in *NLRB v. Financial Institution Employees* (*"FIEA"*), 475 U.S. 192 (1986), makes a certification valid unless and until an individual or group seeking to declare it invalid presents to the Board a proper petition for a Board-conducted election and prevails in that election. This construction of the statute is fully consistent with *Linden Lumber*, and entirely *inconsistent* with the *Celanese* rule applied in this case.

First, the reasons for viewing a Board election as superior to alternative means of determining employee sentiment as to union representation—accuracy, insulation against outside pressures, and exposure to the competing contentions—are as applicable in the decertification context as in the certification situation. Moreover, as this Court has held (*Brooks v. Labor Board*, 348 U.S. 96 (1954)), there is no justification whatever for treating initial recognition as a weighty matter requiring formal procedures, while permitting the destruction of an established bargaining relationship through informal means. To the contrary, the statute affirmatively favors the continuation of established bargaining relationships.

Second, nothing in the statute sanctions an employer refusal to bargain with a union that *does* command ma-

jority support simply because the employer, reasonably or not, believes otherwise. Nor does the statute suggest such a lessened standard on the ground that an employer refusal to bargain is an essential method of promoting employee freedom of choice: A group of employees can upon a proper showing file their own decertification petition if they so choose. Moreover, there is nothing fundamentally unfair about eliminating a scienter test in the failure to bargain situation: Employers can file decertification petitions upon a proper showing if they truly doubt union majority support. And, even if an employer does bargain with a minority union, only a remedial order, and no penalty to the employer, ensues.

Third, only the requirement that those seeking to disestablish the union must bear the burden for demonstrating the basis for doing so is consistent with the statutory interest in the continuity of existing bargaining relationships. Permitting the self-help method sanctioned by the *Celanese* rule, when the statute makes such self-help entirely unnecessary, creates as a practical matter an incentive for employers to disrupt existing bargaining relationships: Even if the employer is eventually found to have committed an unfair labor practice, during the time consumed in litigation no bargaining has occurred, and the union has not functioned as the exclusive representative. Recognizing that such a regime encourages employer actions inconsistent with the statute, this Court has consistently disapproved employer self-help as a way of resolving employee representation issues. *E.g. Brooks v. Labor Board, supra*; *FIEA, supra.*

Given these considerations, it is clear that the employer in this case committed an unfair labor practice when, without filing a petition for a Board conducted decertification election and awaiting the result, the employer refused to bargain with the union that was the certified representative of the employees.

ARGUMENT

Introduction

Put most starkly, the question before this Court in this case is whether an employer, may, consistent with §§ 8(a)(5) & 9(a) of the National Labor Relations Act, as amended, refuse to bargain with the incumbent union when the number of permanent replacements hired during a strike exceeds the number of strikers.[1] The dialogue on this question in the courts of appeals, and before this Court has not put the matter in such straightforward terms. Rather, the question posed has been whether an employer may *presume* that striker replacements do not desire to be represented by the incumbent union, and on the basis of that presumption may treat the union as one that no longer enjoys majority support.[2]

The discussion has proceeded in this fashion because all participants have accepted the validity of the National Labor Relations Board's (NLRB) rule that, as a general matter, an employer's *doubt* that a union previously certified as an exclusive bargaining representative after a Board conducted representation election continues to enjoy the majority support of the employee group can provide a legally sufficient basis for refusing to bargain with the union whether or not the union does *in fact* have majority support. *See Celanese Corporation of America,*

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[1] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [§ 9(a)]." Section 9(a), in turn, provids that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representative . . . for the purpose of collective bargaining."

[2] The precise problem involved in this case arises because, under the NLRA, both strikers and their permanent replacements, if any, are statutory employees and, at least for the first year after the commencement of a strike, both are entitled to have their views as to union representation considered. NLRA §§ 2(3) & 9(c)(3).

95 NLRB 664 (1951) (employer's refusal to continue to recognize an incumbent union is not unlawful if employer can demonstrate a good faith belief, reasonably and objectively based, that the union no longer has majority support.)[3]

As a result, the arguments in this case—and the decisions of the lower courts and of the Board in similar cases—have centered upon whether it is appropriate to regard certain employee actions under certain sets of circumstances (in this instance, taking a job as a striker replacement) as a *proxy* for direct evidence that the employee does not desire union representation. The discussion has been one based on "guesstimates".

In the circumstances of this case, for example, the Board, and the court below have debated the likely union sentiments of striker replacements.[4] The Board has at times surmised that striker replacements generally do not support the union, and at other times surmised that replacements do so in the same proportion as the prestrike employee complement. *Compare Titan Metal Mfg. Co.*, 135 NLRB 196 (1962), *with, e.g., Pennco, Inc.*, 250 NLRB 716 (1980), *enforced on other grounds*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). And the Board now abjures both "guesses" and requires evidence on the striker replacements' desire for continued representation in addition to the fact of their taking the jobs in question.[5] The Board, however, continues to per-

[3] The *Celanese* rule has undergone various permutations over the years. See pp. 8-10 & n.7, *infra*.

[4] *See also* Petition for a Writ of Certiorari at 11-14; Reply Memorandum for the Petitioner at 3 (discussing the numerous other court of appeals' decisions addressing the question). As we explain below, at least part of the uncertainty on whether striker replacements "support" or "do not support" the incumbent union stems from the certainty that "union support" has proved to be an elusive concept. *See* pp. 17-18, *infra*.

[5] As the Board recognized in adopting its current position, working during a strike is, to be sure, an indication that an employee is less likely than other employees to desire union representation, but is *not* sufficient in itself to give rise to a *factual* presumption that the employee does not desire continued union representation. "[A]n employee may be forced to work for financial reasons, or may disapprove of the strike in question but still support union representation . . . and other union initiatives." *Buckley Broadcasting*, 284 NLRB No. 113 (1987), Pet. App. at 75a.

mit employers to decline to bargain with an incumbent union *without* proving through direct, rather than circumstantial, evidence that the union indeed lacks majority support and *without* going through a Board conducted decertification election.

In this brief we argue that this entire approach is an anachronism, left over from an earlier era in which federal labor law jurisprudence took a very different view of several considerations critical to the proper resolution of this case. Among the considerations as to which contemporary doctrine varies from the earlier understanding are: the relevance of employer *scienter* in determining whether a refusal to bargain constitutes an unfair labor practice; the advisability of relying on expressions of employee sentiment on union representation other than the results of a Board conducted election; and the weight to be accorded the maintenance of industrial peace and stability.

This Court's most recent pronouncements on the calculus of these considerations in determining when a union's exclusive representative status is to be established and disestablished militate in favor of abandoning the "good faith doubt" approach altogether. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Financial Institution Employees of America* ("*FIEA*"), 475 U.S. 192 (1986) and *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). These cases suggest—and, we believe, require—that the governing rule of law here is that an established bargaining relationship is to be maintained unless and until the em-

ployer (or an independent group of employees) is able to persuade the NLRB that there is indeed a "question concerning representation" meriting a Board conducted election, and the employees voting in that election choose to decertify the union. Under this regime, the *employees' actual desires*, and *not* the *employer's belief* as to those desires, are the determining factor with regard to the incumbent union's status as an exclusive representative. And, of equal importance, the employees' desires are ascertained in the manner this Court has determined to be the Act's preferred manner; *viz.*, a Board conducted election. This means that established bargaining relationships are not first undone by employer self-help and then litigated about afterwards.

Having said this much by way of introduction, we now review the historical background to the "good faith doubt" defense to a refusal to bargain charge and then turn to an analysis of the current Board law.

1. *Historical Background*: The rule allowing an employer to refuse to bargain if he or she, in good faith, doubts a union's majority support originated in two roughly contemporary Board decisions. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951) and *Celanese Corp., supra.*

In *Joy Silk Mills*—which dealt with a union demand for *initial* recognition—the Board held that an employer "may in good faith insist on a Board election as proof of the Union's majority but that [the employer] 'unlawfully refuses to bargain if its insistence . . . is motivated, not by any *bona fide* doubt . . ., but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'" 85 NLRB at 1265.

The law governing the situation in which an employer refuses to bargain with an *incumbent* union after an

economic strike, and defends its refusal to bargain by asserting a good faith doubt as to the union's continued majority status, has gone through two stages.

Initially, the Board held that an employer could *not* repudiate an existing bargaining relationship on the basis of either a subjective belief of a decline in union support or circumstantial evidence indicating, but not demonstrating, that the union no longer has majority support. As the Board put it in *United States Gypsum Co.*, 90 NLRB 964, 966 (1950):

> Even if we accept as true all the circumstances set forth by the Respondent, they do not establish that the employees desired to withdraw their designation of the Union as their bargaining representative. The Act provides the methods whereby employees who wish to change or eliminate their bargaining representative may do so through Board processes by means of a . . . decertification petition. No such petition has been filed by Respondent's employees.
>
> The Act also provides the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition. This the Respondent failed and refused to do . . . Nor is there any merit to the Respondent's position that, as the Union was seeking recognition, it was incumbent upon the Union to seek Board certification again. Once employees have designated their bargaining representative in accordance with the Act, recognition of that representative is not a matter which an employer may or not grant when and as he chooses. A duty to bargain with such a duly designated representative has been imposed upon him by the Act. The Act also provides the method whereby such duty may be dissolved.

In *Celanese Corp., supra*, however, the Board held that beginning a year after a Board certification, while there is a presumption of the incumbent union's continuing majority status, that presumption may be rebutted not

by proof to the contrary, but by a mere "doubt[] [of] the union's majority, provided that the doubt is in *good faith*." 95 NLRB at 672 (emphasis in original).[6] The Board directly tied the *Celanese* rule to its *Joy Silk Mills* rule, stating it "could find no reason in law or policy which calls for the conclusion that a good faith doubt of majority is no defense to a refusal to bargain after the certificate year any more than is true in cases where there is no certificate." 95 NLRB at 672 n.16.[7]

In the initial recognition situation, of course, the "good faith doubt" approach has now been entirely abandoned. Instead, an employer faced with a union claim of majority support in an unrepresented bargaining unit may ordinarily ignore such evidence of that support as independently verified authorization cards or even majority participation in a recognitional strike. *Linden*

[6] During the first year after Board certification of a union, there is an irrebuttable presumption of continuing majority support. *Brooks v. Labor Board*, 348 U.S. 96 (1954). That presumption was recognized by the Board and affirmed by this Court in the interests of establishing stable bargaining relationships: without the year-long ban on challenges to the union's majority, newly certified unions would have to devote constant attention to proving majority status, and employers would be encouraged to delay reaching an agreement in the hope of eroding union strength. *Id.* at 99-100.

[7] In recent years, employers relying on the *Celanese* doctrine have been required to substantiate their claims with objective evidence which strongly indicates that the union does not have majority support. *E.g., Bartenders, Hotel, Motel and Restaurant Employers Association*, 213 NLRB 651 (1974). And the Board has been chary of showings based on such proxies for the employees' continued desire for union representation as employee turnover, union membership or financial support. *See, e.g., Wald Transfer & Storage Co.*, 218 NLRB 592 (1975).

At the same time, the Board adheres to the proposition that "*Celanese* . . . allows an employer to withdraw recognition, regardless of whether the union has majority status, in fact, if the employer can prove reasonably grounded doubt of that status based on objective considerations free of unfair labor practices." *Bartenders Etc. Ass'n.*, 213 NLRB at 654 n.21.

Lumber Co., supra; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592-94 (1969).[8]

2. *Initiation of Bargaining Rights*: This Court has explained that there are several considerations that justify the rule that an employer who is faced with a union demand for recognition, and who has not committed any pervasive unfair labor practices likely to interfere with a Board-conducted election, may insist on such an election without any inquiry into whether the employer has an adequate good faith basis for disbelieving the union's claim of majority support.

First, the various alternatives to a Board-conducted election are "admittedly inferior to the election process." *Gissel*, 395 U.S. at 603. For one thing, employee expressions of union support other than in an actual election can be somewhat ambiguous in their import. Authorization cards are not always perfectly clear. *Gissel*, 395 U.S. at 604-609. And, "the fact that a majority of the employees strike and picket does not necessarily establish that they desire the particular union as their representative . . . [s]ympathy for strikers, not the desire to have the particular union in the saddle may [be the dominant] influence." *Linden Lumber*, 419 U.S. at 306. In both instances, an employee's apparent choice as to union representation may be "the result of group pressures and not individual decision." *Gissel*, 395 U.S. at 602; *see also Brooks v. Labor Board*, 348 U.S. at 99-100 (a secret

[8] There is no basis in the text of the statute for a rule that disputes over initial recognition are to be resolved only through a Board conducted certification election but disputes concerning the dissolution of a bargaining relationship are to be settled by employer self-help without a Board conducted decertification election.

NLRA § 9(a), after all, "expressly provides that the employees' exclusive bargaining representative shall be the union 'designated or selected' by a majority of the employees in an appropriate unit.'" *Linden Lumber*, 419 U.S. at 311 (Stewart, J., dissenting). And nothing in its legislative history directly supports the proposition that the Act requires Board conducted elections in the initial certification context. *Id.*, at 312-13.

ballot election elminates "the influence of mass psychology"). Finally, a decision made in a Board conducted election is more likely to be an informed choice, and therefore one more likely to abide the test of time, since the Board's processes assure that both the union and the employer have an opportunity to present their views to the electorate, and to respond to each other's claims. *Gissel*, 395 U.S. at 602.

Second, inquiry into an employer's frame of mind—either directly or through a "reasonable person" approach—is an inherently complex fact-bound endeavor likely to lead to lengthy litigation and delays, and an inquiry not consistent with the Act's language or ultimate purposes. *Linden Lumber*, 419 U.S. at 306; *Gissel*, 395 U.S. at 592-93. Just as there is "nothing in the statutory language [of NLRA § 8(a)(2)] prescribing *scienter* as an element of [that] unfair labor practice" (*Garment Workers' v. NLRB (Bernhard-Altmann Corp.)*, 366 U.S. 731 (1961)), so there is nothing in § 8(a)(5) suggesting that an employer's obligation to bargain turns in any way on his or her state of mind.[9]

Third, in the initial recognition situation, it is the union that is seeking to alter the existing form of industrial relations in the particular bargaining unit in question. That being so, the *Linden Lumber* Court determined that "in . . . getting on with the problems *of inaugurating* regimes of industrial peace" (419 U.S. at 307; emphasis added), it makes sense to place the burden of seeking a

[9] Neither NLRA § 8(a)(5) nor § 9(a) suggests that the obligation to bargain turns in any way either on the employer's *beliefs* as to the employees' desires concerning union representation or on the information available to the employer concerning the employees' desires. *See* p. 5, n.1, *supra* (setting out the statutory language). Section 8(d), which further defines the obligation to bargain, does refer to an obligation to "confer in good faith." That language, however, pertains to *how* bargaining is to be carried out, not *whether* bargaining is to begin.

Board election upon the union, as the party seeking to change the status quo (*id.* at 308-09).

3. *Revocation of Bargaining Rights*: Despite the common origin of the *Joy Silk Mills* rule, which was repudiated by the Board in the litigation culminating in *Linden Lumber*, *supra*, and the *Celanese* rule, the Board has not revisited the validity of the latter. The *Celanese* rule, however, is inconsistent with this Court's decisions from *Gissell*, *supra*, through *Fall River Dyeing*, *supra*, and the understanding of the Act's structure and purpose delineated in those decisions. As we now show, in failing to revisit and abandon the *Celanese* rule, the Board has erred, and as a result has needlessly complicated the law in this area.[10]

(a) As we have seen, the Act "empower[s] [the Board] to determine representation on petition of employees or the employer", *FIEA*, 475 U.S. at 198. If the Board determines "that a 'question of representation' exists . . . [the Board] directs a representation election by secret ballot to settle the question" and "certifies the winning union as the bargaining representative." *Id.* "The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative." *Id.*

Unlike the outcomes of most elections held in the American political system, however, the NLRA "does not say how long a certificate of representation shall stand good."

[10] We recognize at the outset of this part of our argument that the Court has, on several occasions, noted in passing that the Board, under its *Celanese* rule, excuses employer refusals to bargain based on reasonably-based doubts concerning a union's continued majority status. *Brooks v. Labor Board*, 348 U.S. at 182; *FIEA*, 475 U.S. at 200, n.8; *Fall River Dyeing*, 482 U.S. at 41, n.8. But the question whether this self-help approach is basically incompatible with the overall structure of the Act as construed by this Court has never been directly at issue in this Court. Moreover, none of these recognitions of the Board's practice is phrased in a way demonstrating approval of *Celanese*. That being so, we believe that these asides do not have any binding force and that the issue we address is an open one.

NLRB v. Whittier Mills Co., 111 F.2d 474, 478 (5th Cir. 1940). It has long been understood, however, that a Board certification

> is not intended to be ephermeral, nor should it be perpetual. On general principle, *since it ascertains a status as existing, the presumption is that that status continues until it is shown to have ceased.* The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered. *So long as the employees make no contention that they are not correctly represented*, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent. [111 F.2d at 478, emphasis added.]

Thus, while "[t]he Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances" (*FIEA*, 475 U.S. at 198), the NLRA does not require that an incumbent union reestablish its majority support periodically, or whenever the employer chooses to question that majority.[11] Rather, as this Court also held in *FIEA*, the Act provides for an orderly procedure for revoking a previous bargaining authorization, and places the burden for invoking that procedure upon *those seeking the revocation*:

> In such cases, employees may petition the Board for another election, alleging that the certified

[11] The statute does *not* in terms require that the employer obligation to bargain collectively runs only to union representatives supported by a majority of the employees *at the time bargaining is sought*. A union that has prevailed in a certification election is a union that has been "designated or selected . . . by the majority of the employees" (NLRA § 9(a)), and is thus a union that fulfills the statutory requirement for serving as an exclusive bargaining representative. Section 9(a), in other words, states the manner in which representatives are to be *initially* "designated or selected," but does not state whether and in what manner a designation once made can, or must, be *rescinded*. Indeed, the statutory "designated or selected" language suggests that the controlling emphasis is not on later informally expressed employee sentiments, but on the most recent *formally* expressed views of a majority of the employees.

> representative no longer enjoys majority support. 29 U.S.C. § 159(c)(1)(A)(ii); 29 CFR § 101.17, 102.60(A) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U.S.C. § 159(c)(1)(B); 29 CFR § 101.17, 102.60(a) (1985); see C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); 29 CFR 101.17 (1985); see *Morris, supra.* Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs election by secret ballot and certifies the result. 29 U.S.C. § 159(c). [*FIEA*, 475 U.S. at 198.]

And, as the *FIEA* Court also indicated, it is contrary to the statutory scheme to permit established bargaining relationships to be dismantled by informal means, such as by employer self-help:

> Under the Act, the certified union must be recognized as the exclusive representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the [situation is one which] raises a question of representation and if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. . . .
>
> * * * *
>
> *Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively.* "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . ." [*FIEA*, 475 U.S. at 202, 209, *quoting Brooks v. Labor Board*, 348 U.S. at 103 (emphasis added).]

In sum, the Act provides that disputes concerning the continued majority status of *incumbent* unions are to be

resolved in a maner parallel to that now prevailing with respect to disputes concerning the majority status of a union seeking initial recognition. A Board-conducted election, and *not* less accurate proxies therefore, is necessary before the preestablished industrial order is to be disturbed. Under such a regime, the outcome turns entirely upon the expressed wishes of those directly affected, the employees, and not on the state of mind, actual or imputed, of the employer. That, of course, is exactly as it should be, where the inquiry concerns the *employees'* free choice and where the decision is made by majority rule. For reasons of maintaining the industrial status quo until a basis is shown for disturbing it, where there is an incumbent union the burden of invoking the Board election procedures must be on those who seek to *de*certify the previously chosen union representative, not on the union.

(b) There can be no doubt that the reasons for preferring a Board-conducted secret-ballot election over alternative means for determining employee sentiment in the initial certification context carry over with full force to the decertification context.

First, indirect expressions of employee desires—or inferences concerning those desires drawn from the actions of the employees and of the union—are necessarily equivocal and inexact in both settings. For example, the *Linden Lumber* Court noted that employees may engage in a recognition strike for reasons of social pressure, fear, or generalized sympathy for strikers, and not because of a desire to be represented by the particular union seeking recognition. By the same token, the refusal of employees to participate in an economic strike, or their determination to take jobs as striker replacements, may indicate economic need, a disagreement with the particular demands animating the strike, or a disagreement with the strike as the proper tactic in a particular labor dispute, and *not* a conviction that the employee group would be better off without its union representative.

As a more general matter, in this context, as in the initial recognition context, the concept of "union support" is inherently elusive. Obviously a strike is a critically important union initiative and employees who do not support a strike are, in one sense, not supporting the union. But the NLRA does not demand that in order to be represented by a union for purposes of collective bargaining, employees must promise to participate in all union initiatives and abide by all union policies, and then adhere to that promise. To the contrary, NLRA § 7 expressly protects the right of *represented* employees to decline to support the exclusive representative in any way other than financially.[12] And, §§ 8(a)(5) & 9(a) mandate that as long as a union has been "designated or selected for the purposes of collective bargaining by the majortiy of employees in a unit appropriate for such purposes", the employer is obliged to bargain with the union.

Thus, employees who work during a strike—or who do not become full union members, or who decline to provide a union with financial support (except when required to do so by a union security clause), or who complain about a particular union policy, or who oppose the present union leadership, or who disagree with a union's bargaining demands—may still decide, when the question is put to them directly, that, *on balance*, they continue to prefer union representation to the employer's unilateral control of their terms and conditions of employment.[13] If a ma-

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[12] Even as to financial support, employees incur such an obligation only where there is a valid union security clause negotiated between the union and the employer, and not otherwise. *See* NLRA § 8(a)(3).

[13] The electoral decisions of citizens are similar, as political pollsters well know: Individuals generally harbor a wide range of views about public issues, some of which coincide with those of a particular candidate and some of which do not. Also, the informa-

jority of employees in an appropriate unit makes that pragmatic choice, the employees are entitled to continued union representation (if the union is willing to represent them) despite a refusal to "support" the union in any of the ways just enumerated.

Even more direct indications of employee sentiment—such as the results of properly limited employer interviews (*see Struknes Constr. Co.*, 165 NLRB 1062 (1967)) and of employee petitions—suffer from defects similar to those of card checks in the initial recognition context. The precise circumstances surrounding the collection of employee views may be in dispute and foster litigation. And "[a] petition or public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." *Brooks v. Labor Board*, 348 U.S. at 99-100.

Further, the absence of a formal Board conducted election has the same effect on the employees' chance to consider both sides of the issue in the decertification context as it does in the certification context. Again, this case is illustrative: Individuals who choose to work as striker replacements may have little knowledge of the circumstances that gave rise to the strike in the first place, and will not, in all probability, be apprised of those circumstances by the employer.

There is, in addition, the consideration that this Court stressed in *Brooks v. Labor Board*, *supra*, a consideration

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tion that an individual has about a particular candidate will vary, both because more information becomes available through the campaign and because the candidate may, through his or her actions during the campaign, convince a voter that he or she should (or should not) be elected. As a result of the complexity of the decisionmaking process, until the actual date of the election, the opinions expressed to polltakers do not necessarily predict the outcome of the actual election.

that arises with even more force *because Linden Lumber*, *supra*, is now the law of the land: "Since an [initial certification] election is a solemn and costly occasion, conducted under safeguards to voluntary choice, *revocation of authority should occur by a procedure no less solemn than that of the initial designation.*" 348 U.S. at 99 (emphasis added).

To permit employers to insist upon a union-instigated certification election in order to establish a bargaining relationship, but then to allow employers to dissolve that duly-certified relationship without ascertaining, *with the same degree of formality*, that the majority support determined with due ceremony no longer obtains, is to turn the doctrinal blade of *Linden Lumber* inward. There is simply no principled justification for the proposition that the NLRA sees the destruction of an on-going bargaining relationship as a less weighty matter than the institution of that relationship. To the contrary, once a bargaining relationship is properly established, there is a statutory interest in the continuity of that relationship. *See Fall River Dyeing*, 482 U.S. at 38-39 (the presumption of continued majority support that arises once a union is certified, is based primarily on the "particular policy decision" that such a presumption furthers the Act's purposes by "permit[ting] unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace"); *FIEA*, 475 U.S. at 208 ("[t]he Act includes several provisions designed to encourage stable bargaining relationships").

Second, the evidentiary difficulties in examining the employer's motives or state of knowledge in order to determine whether the employer has unlawfully refused to bargain are precisely the same in the initial recognition context and in the incumbent union context. The problem is exacerbated in the latter situation by the fact that the *Celanese* rule, even in its present, "objective"

version, still posits that in some cases, an employer's refusal to bargain with an incumbent union will be excused even though the union does *in fact* have majority support at the time of the refusal to bargain. *See Bartenders, Hotel, Motel and Restaurant Employers Association, supra.*

Nothing in the statute countenances such a result. As we have stressed, the Act, in terms, makes it an unfair labor practice to refuse to bargain with a properly selected § 9(a) union representative, even if the employer's refusal is the result of a good faith mistake as to employee sentiment. The opposite rule would "place in . . . careless employer . . . hands the power to completely frustrate employee realization of [a] premise of the Act—freedom of choice and majority rule in employee selection of representatives." *Bernhard-Altman*, 366 U.S. at 739.

Moreover, the Act is *not* premised on the proposition that employers should be encouraged to continually question the employees' commitment to their union representative. The employer is not entrusted with any such responsibility. Rather, the *employees* themselves, if they wish to decertify the union, have the right to file a petition toward that end with the Board. NLRA § 9(c)(1)(A)(ii). Where no such petition has been filed, the fair inference is that the employees remain satisfied with their union representative.

The notion that it is somehow unfair to hold that an employer who acts on a "reasonable belief" that the employee group does not support the incumbent union has committed an unfair labor practice does not hold water. Since 1947, the Act has permitted such an employer to file a decertification petition with the Board as long as the employer has "reasonable grounds for believing that labor organizations claiming to represent employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 NLRB, Legislative History of the Labor Management Relations Act of 1947 (G.P.O.)

416. *See United States Gypsum Co.*, 157 NLRB 652, 656 (1966). And, as we have seen, under this Court's cases, that is the proper step for an employer to take if he or she has a sound basis for doubting majority union support.

The Board does require, it is true, that the employer demonstrate a reasonable objectively-based doubt of the incumbent union's majority in order to secure a decertification election. As a threshold showing for a Board election, however, requiring evidence of that kind makes perfect sense.[14] In that context, the determination that such a doubt exists does not serve to negate the statutory mandate to bargain with the properly designated union representative, but only serves as a precondition to a secret ballot expression of the actual desires of the employees. Additionally, under this approach, the employer may not simply rely on his or her own views about the evidence indicating a lack of union support and forthwith withdraw recognition from the union; rather, a reasonable

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[14] The requirements placed upon a union seeking to obtain a certification election in an initial recognition situation are similar in purpose and effect: A union cannot secure such an election simply by asking for one, or by merely *claiming* substantial employee support. Under the Board's regulations, the union must present evidence of 30% employee support. 29 C.F.R. § 101.18(a). That requirement serves to assure the Board and the affected employees and employer that there is indeed a real "question concerning representation," so that the election is not a useless expenditure of time and trouble. At the same time, by pegging the required showing to less than is necessary to prevail, the Board permits fair entry to the election processes, and allows the representation issue ultimately to be determined by those processes.

So here: the "reasonable doubt" standard in the decertification context, serves to assure the Board that there is indeed a serious "question concerning representation," while allowing access to the Board's processes on a showing less than that necessary in the end to alter the pre-existing bargaining relationship. In the decertification context, then, the reasonable doubt standard serves as an effective screening device, but in contrast to the *Celanese* approach, does not substitute a lesser standard for the statutory standard governing the obligation to bargain.

doubt as to continued union support triggers *a Board* determination of the adequacy of that evidence *before* the employer is permitted to act, not afterwards.[15]

Further, if an employer declines to take advantage of this means of ascertaining whether the union has lost majority support and erroneously bargains with a union that in fact does not enjoy such support, "no penalty attaches to the violation." *Bernhard-Altmann*, 366 U.S. at 740. Rather, if an employer "is found to have erred in extending [continued] . . . recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act." *Id.*; *see also Fall River Dyeing*, 482 U.S. at 51, n. 18. Thus, the employer is not in any meaningful sense acting at his or her peril.

Third, and finally, requiring an employer to bargain with an incumbent union until that union is decertified in an election precipitated by the employees, or by the employer, sets a proper balance between the interest in the stability of established bargaining relationships and the interest in employee free choice as to representation. This approach places the burden on those seeking to disrupt an established relationship to justify the need to do so and if that is done gives full access to the Board representation election processes.

Indeed, as we have noted, in the incumbent union situation, the union enjoys what is termed a "presumption" of majority support premised upon a strong statutory policy favoring the continuity of bargaining relationships

[15] Neither the filing of a decertification petition nor the determination by the Board that the petition generates a question concerning representation indicates an actual loss of the incumbent union's majority support. Thus, under the Board's cases, neither justifies a refusal to bargain. *Dresser Industries*, 264 NLRB 1088 (1982); *Hydro Conduit Corp.*, 278 NLRB 1124 (1986), *enf't denied on other grounds, NLRB v. Hydro Conduit Corp.*, 813 F.2d 1002 (9th Cir. 1987).

once established. The *Fall River Dyeing* Court emphasized:

> The overriding policy of the NLRA is "industrial peace." *Brooks v. Labor Board*, 348 U.S. at 103 . . . The presumptions of majority support further this policy by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees". . . . In essence, they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. See *Brooks v. Labor Board*, 348 U.S. at 100. . . . The presumptions also remove any temptation on the part of the employer to avoid good faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. [482 U.S. at 38.]

It follows *a fortiori* from this substantive policy that the burden is on those who believe that the union has lost its majority support to invoke the appropriate Board election processes for so determining.

Permitting employers to refuse to bargain with an incumbent union on the *belief* that the employees no longer desire union representation is, in contrast, a policy that leads to the instability of bargaining relationships. Since the Board's election processes are available where there is a basis to question a union's continuing support, the employer's failure to use those processes puts into question his or her true motive for engaging in self-help rather than seeking the election. There is, as a practical matter, a strong incentive for employers to claim a loss of majority support and then to refuse to bargain with a union, even where the employer is far from sure that the employees no longer desire union representation. As long as an employer can present loss of majority support as a colorable defense, the pendency of the legal proceedings alone, and the dormancy of the bargaining relationship in the meanwhile, tend to undermine the union's ability to serve the employees, and thereby finally

to destroy the bargaining relationship. This Court has several times recognized as much:

> Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. . . . The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents . . . with due regard to administrative prudence.
>
> We find wanting the arguments against these controlling considerations. . . . [*Brooks v. Labor Board*, 348 U.S. at 103. *See also FIEA*, 475 U.S. at 209; *Fall River Dyeing*, 482 U.S. at 50, n.16.]

* * * *

In sum, the Board, and this Court, have determined that where there is a dispute over a union's majority support in the initial recognition situation, the Act's purposes are best fulfilled by a formal Board certification that the previously established regime for industrial governance no longer represents the desires of the employees. The reasons underlying that determination apply with considerably more force where there is an incumbent union and an established bargaining relationship and there is a dispute over the union's continued majority support. Consequently, this Court should disapprove the *Celanese* rule governing the latter situation.

Instead of permitting employers such as the one in this case to refuse to bargain on the basis of inferences and surmises about the desires of employees as to union representation, this Court should require the use of the formal Board representation-election process to ascertain the employees' true sentiments in this regard.

By refusing to bargain with the certified representative of its employees, without first filing a petition for a Board-conducted decertification election and awaiting the outcome, the employer in this case committed an unfair labor practice.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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